

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWENTY-FIFTH DIVISION

DIONYSIUS HIPP, INDIVIDUALLY
on behalf of himself and All Others
Similarly Situated

PLAINTIFF

V. NO. 2009-CV-20432

MECHANICAL PUBLISHERS, INC. and
BANANABERRY ENTERPRISES, INC.

DEFENDANTS

Proceedings in the Circuit Court of Pulaski County, Arkansas, on the 18th day of June, 2010, Hearing on Motion to Dismiss.

BE IT REMEMBERED, that on the 18th day of June, 2010, before the Honorable N. DECISIVE the above-styled matter came on for hearing:

PROCEEDINGS

THE COURT: We're back on the record, it's still June 18, 2010. The next case on the docket is Hipp versus Mechanical Publishers, Inc et al. I recognize Mr. Hipp, Mr. Bananaberry, and all the attorneys involved in this case, Mr. Laquelle, Mr. Schulze, Ms. Hyde.

MS. HYDE: I don't have anything to do with this one, Your Honor. It's Mr. Laquelle's case. I'm here for the Perkins case, 2008-2423.

THE COURT: Are you trying to distance yourself from this one, Ms. Hyde.

MS. HYDE: Candor to the Court requires me to concede that, Your Honor, but it's also the fact that I haven't actually done any work on it, so I don't know anything about it other than some--well, in the interest of propriety let's call it work product--that I've heard in the office.

THE COURT: Thank you. I'll start again.

THE COURT: Number 2009 4321, Hipp v. Mechanical Publishers, Mr. Hipp is here *pro se*. The movant, Mechanical Publishers, is represented by Mr. Laquelle, and Bananaberry Enterprises, which joins in the motion, is represented by Mr. Schulze. I recognize all of you, but if you would identify yourselves for the record please.

MR. HIPPI: I'm Dionysius Hipp, I'm here on behalf of myself and all the other people who have been screwed by the defendants in this case.

MR. LAQUELLE: Your Honor, I'm O. Will Laquelle, I represent Mechanical Publishing, and for the record, Mr. Hipp represents only himself. The Court has not yet certified the class Mr. Hipp purports to represent. I just wanted to make that clear.

THE COURT: I'm aware of that.

MR. SCHULZE: I'm Gerry Schulze. I represent Bananaberry Enterprises.

THE COURT: I see from the pleadings that your client is now a Luxembourg Corporation.

MR. SCHULZE: Yes, your Honor. The holding company for the Bananaberry entities is now domiciled in Luxembourg for reasons I cannot honestly pretend to understand.

THE COURT: Welcome back to the United States for purposes of this litigation.

MR. SCHULZE: Thank you, Your Honor.

THE COURT: I have read the pleadings in this matter and I believe I am familiar with the issues, but I always welcome oral arguments to flesh out the arguments and help me understand subtleties that I may have missed. The burden is on the movant. I believe you are all familiar with the procedures in my court. Unless there are any questions, or preliminary matters, Mr. Laquelle, you may begin.

MR. LAQUELLE: Thank you, Your Honor. We have sought to narrow our argument down to some points that we feel are essentially beyond dispute. There are two counts in the complaint. Neither count states a cause of action under the law.

The first count is fraud. As the Court is well aware, there are five elements of a cause of action for fraud. We don't feel that Mr. Hipp has properly alleged, much less can prove, a single one of them. That notwithstanding, we have selected what we feel to be the easiest elements to argue about for

our motion. Mr. Hipp contends that our advertisements hold our publications out as “high quality” pornography. While we dispute the characterization of our advertisements, assuming for purposes of the motion that the characterization is accurate, any such characterization is, at most, mere “puffery.” It is a statement of opinion--nothing more.

THE COURT: Mr. Laquelle, it is Mr. Hipp’s position that the statement is a statement of what he calls a false opinion. He alleges that nobody at Mechanical Publishers really thinks that its publications are pornography, high quality or otherwise. He contends that if allowed to do discovery, he will not find a single individual at Mechanical Publishers who thinks the publications are even mildly obscene. How do you respond to that?

MR. LAQUELLE: Arkansas law does not require a salesperson to actually believe statements of opinion that he or she makes on behalf of his employer. It is our position that the corporate entity may officially adopt an opinion that its product is high quality pornography, and its agents may repeat that opinion, not as their own opinion, but as the opinion of the corporation. At no point could Mr. Hipp point to any representation that suggests that any particular individual considered “Lurid Tales of Depravity” high-quality pornography. The opinions were always unattributed. The opinion-holder, in this instance, was the corporation. The opinions were held by the corporation.

THE COURT: How could the corporation hold those opinions?

MR. LAQUELLE: They were approved by the Board of Directors on a majority vote, recorded by the secretary, and entered into the official minutes.

THE COURT: You may continue.

MR. LAQUELLE: Mr. Hipp also contends that we fraudulently refuse to sell our product to minors. While this practice may tend to mislead some purchasers, we have every right to withhold sales to minors if we choose. There's nothing illegal about that.

Finally, there's the controversy about the language "This page intentionally left blank." The easiest argument in this case is that the Plaintiff can't show justifiable reliance. If it's false, it's self-evidently false. The falsity of the representation is apparent right there with the representation. But more clear than that is the fact that we sell our products by mail-order. Mr. Hipp never saw the representation until after he had already purchased the product.

Assuming, hypothetically, that what Mr. Hipp was looking for was some high-quality porn with a number of blank pages that he could--I don't know--draw his own pictures on--he wasn't cheated. He didn't know about the representation until he had already sent in his money, purchased the product, and got his product in the mail.

As to the “outrage” claim, suffice it to say that the Court has been very strict on what will suffice to state a claim for outrage, and this doesn’t get close. The Arkansas Supreme Court and Court of Appeals have been very clear about the elements of the tort of outrage, also known as intentional infliction of emotional distress. It must be shown that the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct the conduct was extreme and outrageous was beyond all possible bounds of decency and was utterly intolerable in a civilized community, the actions of the defendant were the cause of the plaintiff’s distress, and the emotional distress sustained by the plaintiff was so severe that no reasonable man could be expected to endure it. None of those elements applies here. In his deposition, Mr. Hipp hardly described emotional distress so severe that no reasonable man could be expected to endure it if, indeed, Mr. Hipp can be deemed a “reasonable man” for purposes of this litigation, or any other purposes for that matter.

Therefore, the Court has no choice but to dismiss this case for failure to state a cause of action.

THE COURT: Is there anything else?

MR. LAQUELLE: It just occurred to me that this is a Motion to Dismiss, I’d like to withdraw the statement I made about Mr. Hipp’s deposition.

THE COURT: It is in the record, but you are correct, I can't really rely on it.

Anything else?

MR. LAQUELLE: That would be all, unless the Court has any questions.

THE COURT: I've read the briefs, and I think I understand your argument.

Mr. Schulze, I've read your brief, too, do you have anything else to add.

MR. SCHULZE: No, Your Honor. Mr. Laquelle has covered it all quite well.

THE COURT: Mr. Hipp, it's your turn.

MR. HIPPI: May it please the Court, Counsel, and ladies and gentlemen waiting to present other cases, and Deputy Olsen, and the cute lady up there who's typing all this. How do you do that, anyway? That's amazing. Well, fraud is a lie, isn't it? And the statement "This page intentionally left blank," well it's a lie. It isn't true. How am I hurt? If the page was blank, it'd be worth something. I could write a grocery list on it. I could write a letter of complaint on it. I could draw my own picture on it. I could do something with it. It makes the page even more useless than it was before. Now, these books, they're a complete rip-off. They're just old books reprinted with new names. It's a scam, I tell you, a scam. The way they've got it figured, they're conning people into thinking they're buying dirty books. And when people get cheated on dirty books, they'll be too

embarrassed to complain. “Lurid Tales of Depravity” Well why were you buying lurid tales of depravity in the first place?

Well I’ll tell you Judge. I like lurid tales of depravity. I like dirty books. And sure, I can’t define dirty, but I know what I like, as the gentleman said, and this isn’t it. But you know what’s more, this isn’t even close. They knew better. I would say if they genuinely didn’t know better, if they really could have, in all fairness and good faith, thought they were selling dirty books, even if they just happened to not be all that dirty, that might be one thing, but here they knew perfectly well what they were doing. They knew they were taking stuff that they teach in high school. This “Teen Lust” story. Well I found out it’s actually Romeo and Juliet and this Billy S guy is writing under another name, William Shakespeare. It’s the same stuff they’re teaching in school, and they knew it. But they make a big honking deal out of how they won’t sell this stuff to minors. They do that when they know perfectly well that our schools make, not let, make minors read it in class. Judge, that isn’t puffery. That’s lying. They know better. it’s not a matter of opinion. That’s a false opinion.

And I was really really really really put out by it. I was so put out by it, I sued. Now if that doesn’t prove that I suffered mental distress so extreme

and outrageous that no reasonable person should be expected to suffer it in silence, there isn't any such proof in the world.

So let me have my day in court, Judge. Let me tell my story to a jury. They won't like this any better than I do, any better than you probably do if you were allowed to set aside that judicial temperament for a moment and show some good ol' fashioned outrage. Let me at 'em, Judge. Let me at 'em.

That's all.

THE COURT: Any rebuttal.

MR. LAQUELLE: I'd better not.

MR. SCHULZE: Mr. Laquelle has stated it eloquently.

MR. HIPPE: Do they pay that guy to do that? Just sit there and agree with that smart-ass?

THE COURT: Then I'll take the matter under advisement.